No. 91-399

In the Supreme Court of the United States

OCTOBER TERM, 1991

DEVIN S. BRINSTON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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September 1991

27 pgs

QUESTION PRESENTED

Whether petitioner was improperly convicted by a court that lacked jurisdiction to try him for the charged offenses after the convening authority ordered those charges dismissed.

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DEVIN S. BRINSTON, PETITIONER

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UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Devin S. Brinston, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on June 12, 1991.

OPINIONS BELOW

The United States Air Force Court of Military Review issued its reported decision setting aside the findings of guilty and the sentence on November 16, 1989. *United States v. Brinston*, 29 M.J. 871 (A.F.C.M.R. 1989) (Appendix A). The decision of the United States Court of Military Appeals reversing the Air Force Court of Military Review is reported at 31 M.J. 222 (C.M.A. 1990) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on June 12, 1991 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. 1991) and 10 U.S.C. § 867a (Supp. 1991).

STATEMENT OF THE CASE

In September of 1988 the petitioner, an Air Force sergeant (E-4), was tried by a general court-martial at Tinker Air Force Base (AFB), Oklahoma. In accordance

with his pleas of guilty, the petitioner was convicted of five specifications of failing to go to his appointed place of duty in violation of Article 86, UCMJ, 10 U.S.C. § 886 (1988), one specification of wrongful use of marijuana in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (1988), and two specifications of bank fraud in violation of Article 134, UCMJ, 10 U.S.C. § 934 (1988).[1] The petitioner was sentenced to a bad conduct discharge, confinement for 18 months, forfeiture of $500.00 per month, and reduction to airman basic (E-1).

On March 23, 1989, the Air Force Court of Military Review set aside the findings and the sentence on the basis that the charges had been improperly referred to a nonexistent court. *United States v. Brinston*, 28 M.J. 631 (A.F.C.M.R. 1989). The decision of the Air Force Court of Military Review authorized an "other" trial in accordance with Rule for Court-Martial (R.C.M.) 1107(e)(2). The record of trial was, therefore, returned to the convening authority for decision regarding whether or not to proceed with such an "other" trial.

On 4 April 1989, the convening authority signed Special Order A-1031 directing that an "other" trial be convened to hear the charges.

On 20 April 1989, however, the convening authority published a supplementary order in the case, General Court-Martial Order No. 3. That order read as follows:

> *The charges are dismissed.* All rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and the sentence so set aside will be restored. A rehearing has been ordered before another court-martial which has been designated. (Emphasis added.)

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[1] The specifications alleging bank fraud were charged so as to assimilate under Article 134 the offense described in 18 U.S.C. § 1344 (1988).

Appellant was tried again on 26 April 1989 and was again convicted in accordance with his pleas of guilty. He was sentenced to a bad conduct discharge, 16 months confinement, forfeiture of $450.00 per month for 16 months, and reduction to airman basic (E-1). The convening authority later granted petitioner clemency, approving no confinement in excess of 6 months and 1 day.

The Air Force Court of Military Review carefully examined the record of trial and determined that, by the express language of General Court-Martial Order No. 3, the convening authority *dismissed* the charges. Accordingly, on November 16, 1989, the Court of Military Review set aside the findings and the sentence and, in the interest of fairness and judicial economy, directed that another trial would *not* be appropriate. *United States v. Brinston*, 29 M.J. 873 (A.F.C.M.R. 1989). The government's December 6, 1989 suggestion for reconsideration of the Air Force Court of Military Review's decision was denied on January 12, 1990.

On February 12, 1990, The Judge Advocate General of the United States Air Force filed a certificate for review with the United States Court of Military Appeals in the case. The Court of Military Appeals determined that, notwithstanding the express language of General Court-Martial Order No. 3, the convening authority's statement dismissing the charges was an "administrative error" caused by a careless minion. *United States v. Brinston*, 31 M.J. 222, 224 (C.M.A. 1990). The Court reversed the decision of the Air Force Court of Military Review, reinstating the findings and the sentence and directing further review not inconsistent with its opinion. After further review, *United States v. Brinston,* ACM 27,269 (f rev) unpub. op. (A.F.C.M.R., December 21, 1990) (Appendix C) the case was finally denied by the U.S. Court of Military Appeals on June 12, 1991. (Appendix D).

REASONS FOR GRANTING THE WRIT

The requested Writ is appropriate in this case because the United States Court of Military Appeals has permitted

a service member to be convicted by a court that was not jurisdictionally empowered to try him.

Judge Leonard, in his opinion below, hit the nail squarely on the head when he said:

> Dismissal of the charges contemplates that an accused no longer faces those charges and reinstitution of those charges requires the command to start over. *United States v. Britton*, 26 M.J. 24 (C.M.A. 1988). If the dismissed charges are to again be the subject of a court-martial, they will have to be repreferred, investigated, and referred as though there were no previous charges or proceedings. *Id.* at 26. Therefore, in appellant's case, the convening authority's dismissal of charges prior to the beginning of his second court-martial, with no further action to resurrect them, deprived that court-martial of jurisdiction over those charges.

United States v. Brinston, 29 M.J. 871, 872 (A.F.C.M.R. 1989).

Under the Uniform Code of Military Justice, 10 U.S.C. § 801, *et seq.*, the convening authority has the discretion to remove charges from a court-martial at any time before findings are announced. R.C.M. 604(a); *see United States v. Shepardson*, 17 M.J. 793 (A.F.C.M.R. 1983). Although dismissed charges may be rereferred, the charges *do not exist* absent such a rereferral. *United States v. Britton*, *supra*. The dismissal of charges, therefore, divests the court-martial to which the charges were initially referred of jurisdiction over the case.

Military law requires that the convening authority's decision to either order a rehearing or dismiss the charges must be published in an appropriate supplementary *order* and prescribes the format for that order. *Manual for Courts-Martial, United States*, Appendix 17b (1984) (Ap-

pendix E). Appendix 17 specifically cautions the drafters of such documents to exercise extreme care in selecting the language used in these forms.

The Court of Military Appeals' assertion that it is readily apparent that the use of the words "the charges are dismissed" was a clerical error that should have no significance is incorrect. The only thing apparent about this situation is that the convening authority issued an order dismissing the charges. How that order came to be promulgated is, under the circumstances of this case, a matter of sheer speculation.

The fact that the matter ultimately proceeded on to trial is not controlling. In this regard, the Army Court of Military Review's decision in *United States v. Motes*, 40 C.M.R. 876 (A.C.M.R. 1969) is illustrative. In that case, the convening authority dismissed some, but not all, of the specifications prior to trial. The trial nevertheless proceeded on all charges and specifications. The Army Court of Review held that, notwithstanding Motes' pleas of guilty and the negotiation of a pretrial plea agreement, the charges were not properly before the court. The court observed that proper referral is more than a procedural matter—it is a necessary predicate to court-martial jurisdiction. *Id.* at 879. The court stated that:

> . . . when, or by whose authority, these questioned specifications were referred to trial can be only a matter of speculation and conjecture. Clearly, the dictates of Article 34 [2] of the Code require more.

Id. at 879.

In *United States v. Ware*, 5 M.J. 24 (C.M.A. 1978), the United States Court of Military Appeals held that the absence of a proper written order modifying the original

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[2] Article 34, UCMJ, 10 U.S.C. § 834 (1988) provides for the referral of charges to trial by court-martial.

convening order deprived the court-martial of jurisdiction. In that case, the trial counsel announced that the original convening order had been verbally modified but failed to include in the record a written confirmation of that modification. In reversing and dismissing Ware's conviction, the Court described the issue as:

> . . . yet another jurisdiction problem caused as a direct result of apparently indifferent discharge of the simplest and most basic administrative duty of those responsible for the military court-martial process, i.e., properly prepared convening orders and attendant modifications.

United States v. Ware, 5 M.J. 24, 25 (C.M.A. 1978).

The Court of Military Appeals' after-the-fact attempt to reconstruct a concatenation of circumstances that might have produced the phraseology contained within this order is just the kind of speculation and conjecture that the courts in *Motes* and *Ware* refused to sanction. This Honorable Court should not sanction it either.

The government below urged the court to consider the ambiguity inherent in the language of General Court-Martial Order No. 3 and resolve that ambiguity in favor of the government. The Court of Appeals seized on this invitation and concluded that it was more "reasonable" to read the order to imply that the convening authority's intent was not to dismiss the charges, notwithstanding the express language to the contrary. *See United States v. Padilla*, 1 U.S.C.M.A. 603, 607, 5 C.M.R. 31, 35 (1952).

Petitioner suggests, however, that any ambiguity in the order in this case should be resolved in favor of the defense, not the prosecution. Initially, petitioner points out that it was the prosecutor, not petitioner, that drafted General Court-Martial Order No. 3. A reasoned application of the rules of construction regarding any such ambig-

guities would be to construe the ambiguities in the document against the drafter. *See generally United States v. Harvey*, 848 F.2d 1547 (11th Cir. 1988); *United States v. Quartermain*, 613 F.2d 38, 46-47 (3rd Cir. 1980) *cert. denied* 446 U.S. 954 (1980) (ambiguity in grant of transactional immunity construed against government). Further, appellant suggests that the Court of Appeals' flat rejection of the application of the rule of lenity to these circumstances was misguided. *See United States v. Bass*, 404 U.S. 336, 347-48 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Ladner v. United States*, 358 U.S. 169, 177 (1958); *Bell v. United States*, 349 U.S. 81 (1955). The rule of lenity, a rule of statutory construction, suggests that, as a matter of public policy, ambiguities in criminal statutes should be construed in the manner that results in the most lenient result for the accused. Contrary to the conclusion of the lower court, petitioner suggests that those same policies apply to the case at bar. A reasoned application of the rules of construction leads to the exact opposite conclusion from that drawn by the Court of Military Appeals. If it was ambiguous whether the words "the charges are dismissed" actually meant "the charges are dismissed" in this case, that ambiguity should surely have been resolved in favor of petitioner.

In sum, petitioner submits that the decision of the United States Court of Military Appeals permitting him to be convicted by a court-martial that was not jurisdictionally empowered to try him was grossly unfair and deprived him of due process of law. U.S. Const., amend. V. That decision should, therefore, be reversed.

CONCLUSION

The petitioner's case is worthy of Supreme Court review. In particular, this case offers a unique opportunity to address the jurisdictional limitations of courts-martial

to try cases after the convening authority has ordered the charges dismissed. Petitioner, therefore, respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted.

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September 1991

APPENDIX A

U.S. AIR FORCE COURT OF MILITARY REVIEW
ACM 27269 (reh.)

UNITED STATES

v.

SERGEANT DEVIN S. BRINSTON, FR 399-62-2269,
UNITED STATES AIR FORCE

Sentence Adjudged 26 April 1989.
Decided 16 Nov. 1989.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair, Captain Ronald A. Gregory and Captain Laurence M. Soybel.

Appellate Counsel for the U.S.: Colonel Joe R. Lampert; Major Terry M. Petrie and Major Paul H. Blackwell, Jr.

Before FORAY, LEONARD and MURDOCK, Appellate Military Judges.

DECISION UPON REHEARING

LEONARD, Judge:

This case is again before us for review. On 23 March 1989, we held that the general court-martial which convicted and sentenced appellant was not convened by an official empowered by Article 22, UCMJ, 10 U.S.C. § 822. We set aside the approved findings and sentence and

authorized an other trial under R.C.M. 1107(e)(2). *United States v. Brinston,* 28 M.J. 631 (A.F.C.M. R.1989). The record of trial was returned to the convening authority for action consistent with our opinion.

On 4 April 1989, the convening authority referred the original charges to trial by an "other" general court-martial. On 20 April 1989, a supplementary court-martial order, General Court-Martial Order No. 3, was published. This order announced the results of our 23 March decision and stated:

> *The charges are dismissed.* All rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and the sentence so set aside will be restored. A rehearing has been ordered before another court-martial which has been designated. (Emphasis added.)

Without any other action on the charges, appellant's court-martial convened on 26 April 1989. The trial proceeded without any mention of General Court-Martial Order No. 3 and, in accordance with a pretrial agreement, appellant pleaded guilty to all charges and specifications except Charge III. After the pleas, Charge III was withdrawn and appellant's pleas were accepted, findings entered, and a sentence imposed.

When the record of appellant's "other" trial reached us for review, we noticed an apparent inconsistency between referring the original charges to an "other" trial and later dismissing them. In a specified issue to appellate counsel, we asked whether dismissal of the charges after their referral, rendered the subsequent conviction on these charges a nullity. Both appellate government and appellate defense counsel agreed that dismissal of the charges by General Court-Martial Order No. 3 deprived appellant's second court-martial of jurisdiction over these charges and rendered his conviction a nullity.

Upon receipt of the opinion by this court, the convening authority could have decided to order an "other" trial or to dismiss the charges. The results of that decision are promulgated in an appropriate supplementary order following the format of Appendix 17b, Manual for Court-Martial, 1984. The formats in this appendix provide a number of opinions and the drafter must choose the proper words to reflect the convening authority's decision. The introduction to Appendix 17b advises that "extreme care" be used in selecting the proper words from the sample forms. Whether or not intended, General Court-Martial Order No. 3 dismissed all the charges against the appellant and no action was taken to reinstate them prior to appellant's second trial. The result is similar to that in *United States v. Motes,* 40 C.M.R. 876 (A.C.M.R. 1969), where the convening authority dismissed some of the specifications against the accused prior to trial, but the trial nevertheless proceeded on all charges and specifications. The *Motes* court held, that despite a pretrial agreement and pleas of guilty, the dismissed specifications were not properly referred to trial and the convictions on the dismissed charges must be set aside. *Id.* at 879.

Dismissal of charges contemplates that an accused no longer faces those charges and reinstitution of those charges requires the command to start over. *United States v. Britton,* 26 M.J. 24 (C.M.A. 1988). If the dismissed charges are to again be the subject of a court-martial, they will have to be repreferred, investigated and referred as though there were no previous charges or proceedings. *Id.* at 26. Therefore, in appellant's case, the convening authority's dismissal of charges prior to the beginning of his second court-martial, with no further action to resurrect them deprived that court-martial of jurisdiction over those charges.

The findings of guilty and the sentence are set aside. Since this is appellant's second trial on these charges and the results of both trials have been set aside because of defects in the government's processing of the case, in the interest of fairness and judicial economy, another trial is not appropriate. *United States v. Stroup,* 29 M.J. 224 (C.M.A.1989).

Judge MURDOCK concurs.

FORAY, Senior Judge (dissenting):

I am convinced that the statement—"the charges are dismissed"—in General Court-Martial Order No. 3 was erroneously included in the order by the drafter and that dismissal of the charges pending against appellant was not intended by the convening authority.[1] That statement was not in consonance with the other required actions taken by him during the processing of this case.[2] As convening authority he performed numerous functions required to be taken during the pendency of this case manifesting his intention that appellant was to be tried anew by a general court-martial and which were inconsistent with an intention to dismiss the charges. In addition to referring the charges against appellant to trial by general court-martial and convening a court-martial to do so, the convening authority approved appellant's Offer For Pretrial Agreement; authorized a post-arraignment withdrawal of five of the fourteen specifications pending against appellant; and took action with regard to the findings and sentence in the case. The latter three described steps took place after Gen-

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[1] This apparent error in General Court-Martial Order No. 3 may be remedied by the issuance of a corrected copy of that order omitting the language dismissing charges. *See* AFR 111-1, paragraph 17-1e.

[2] The convening authority exercising general court-martial jurisdiction over appellant at his "other" trial was the same officer who exercised general court-martial jurisdiction over appellant at his former trial.

eral Court-Martial Order No. 3 had been published thereby conclusively manifesting the convening authority's intention to have the charges against appellant tried by general court-martial and not dismissed. The situation here is clearly distinguishable from that outlined in *United States v. Motes,* 40 C.M.R. 876, cited by the majority. In *Motes* the question as to whether the convening authority had referred certain specifications of a charge to trial was found by the Army Board of Review to be "only a matter of speculation and conjecture." Such is not the case here.

I would find the administrative error committed by the drafter of General Court-Martial Order No. 3 did not give rise to a jurisdictional defect in the general court-martial of appellant mandating reversal of the conviction. "[A] writing should be construed to give meaning and effect to all its [parts]". "[W]hen alternative constructions are possible 'the more reasonable should be chosen.' " *United States v. McDaniel,* 7 U.S.C.M.A. 56, 21 C.M.R. 182, 185 (1956). Neither military nor civilian law demands rigid adherence to abstract form.

Here, the court-martial was convened by an official empowered to convene it; it was composed in accordance with the R.C.M. with respect to number and qualification of its personnel; the charges were referred by competent authority; appellant was subject to court-martial jurisdiction; and the offenses charged were subject to court-martial jurisdiction. The requisites of general court-martial jurisdiction over appellant jurisdiction set forth in R.C.M. 201(b), were thus met. *United States v. Blaylock,* 15 M.J. 190 (C.M.A.1983); *United States v. Simpson,* 16 U.S.C.M.A. 137, 36 C.M.R. 293 (1966); *United States v. Emerson,* 1 U.S.C. M.A. 43, 1 C.M.R. 43; *United States v. Otero,* 26 M.J. 546 (A.F.C.M.R.1988); *United States v. Fields,* 17 M.J. 1070 (A.F.C.M. R.1984).

Accordingly, I would affirm the approved findings of guilty and the sentence.

APPENDIX B

U.S. COURT OF MILITARY APPEALS
No. 64,123
ACM 27269

UNITED STATES, APPELLANT,

v.

DEVIN S. BRINSTON, SERGEANT, U.S. AIR FORCE, APPELLEE

Argued May 10, 1990.
Decided Sept. 26, 1990.

For the Accused: CAPTAIN RONALD A. GREGORY (argued); COLONEL RICHARD F. O'HAIR (on brief).

For the United States: MAJOR PAUL H. BLACKWELL, JR. (argued); COLONEL ROBERT E. GIOVAGNONI (on brief).

OPINION OF THE COURT

EVERETT, Chief Judge:

On review of the accused's general court-martial conviction for failure to repair (5 specifications), wrongful use of marijuana, assault and battery, and bank fraud (2 specifications),* the Court of Miliary Review held that the charges against Brinston had been improperly referred to trial by a person who lacked authority to convene a gen-

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* *See* Arts. 86, 112a, 128, and 134, Uniform Code of Military Justice, 10 USC §§ 886, 912a, 928, and 934, respectively.

eral court-martial. 28 MJ 631 (1989). Accordingly, the court set aside the findings and sentence and authorized "an 'other' trial" under RCM 1107(e)(2), Manual for Courts-Martial, United States, 1984. 28 MJ at 633.

The second time around, the general court-martial, consistent with the accused's pleas, convicted him as it had the first time and sentenced him to a bad-conduct discharge, confinement and forfeiture of $450.00 pay per month for 16 months, and reduction to the lowest enlisted grade. The convening authority approved these results except for confinement exceeding 6 months and 1 day.

Again the Government did not fare well before the Court of Military Review. In its review of this second court-martial on the original charges, a majority of the panel of that court agreed with both defense and government counsel that the convening authority had ordered the charges dismissed after their referral and that, accordingly, the second conviction, like the first, was a nullity. 29 MJ 871 (1989). The majority rejected the view of the dissenting judge (*id.* at 873) that the "dismissal" was merely an "administrative error" and that the intent of the convening authority to refer the charges to "an 'other' trial" was quite clear from all the circumstances. Instead, the majority decided that the dismissal was effective, "[w]hether or not intended." *Id.* at 872.

Accordingly, the court set aside the findings and sentence. Additionally, the court observed:

> Since this is appellant's second trial on these charges and the results of both trials have been set aside because of defects in the government's processing of the case, in the interest of fairness and judicial economy, another trial is not appropriate. *United States v. Stroup,* 29 M.J. 224 (C.M.A.1989).

29 MJ at 872.

Apparently reflecting a change of heart, government counsel filed with the court a Suggestion for Reconsideration (En Banc) of the panel's decision, which was denied. Then, the Judge Advocate General certified two questions to this Court for review: The first challenges the correctness of the Court of Military Review's decision that the convening authority had, as a matter of law, dismissed the charges after rereferral; and the second asks whether the concluding language ("another trial is not appropriate") of the majority opinion, cited above, bars the Government from retrying the accused.

We decide that the court did err, as a matter of law in holding that the charges against the accused had been dismissed by the convening authority. In light of the answer to this first question, the second need not be addressed.

I

While application of the law in this controversy is in dispute, the facts are not.

The Court of Military Review set aside the first findings and sentence on March 23, 1989, and returned the record to the convening authority for action consistent with that opinion. On March 29, the special court-martial convening authority, after reviewing the report of the original investigation under Article 32, Uniform Code of Military Justice, 10 USC § 832, and the pretrial advice "recommended[ed] the case . . . be referred to a General Court-Martial for an 'other trial' as authorized by the" appellate court; the staff judge advocate had made an identical recommendation earlier on the same date.

The convening authority agreed, stating in an indorsement to the transmittal of Court-Martial Charges dated April 3, 1989:

> I have certainly reviewed the Report of Investigation dated 12 August 1988 and the advice of the Staff Judge Advocate. I hereby order that the charges and specifications in the case of Sgt Devin S. Brinston be tried by a General Court-Martial.

Special Order A-1031, which convened the general court-martial to which the accused's case was referred for trial, was signed on April 4, 1989.

Two days later, the accused sent the convening authority a Request for Discharge in Lieu of Trial by Court-Martial. In that document, the accused acknowledged that "I understand the elements of the offenses with which I am charged" and that he had "received copies of the . . . Charge Sheet dated 4 April 1989." In a memorandum dated April 14, 1989, the staff judge advocate noted that the accused's commander and the special court-martial convening authority both recommended to the convening authority "that this request be rejected" and that he concurred. On April 21, the convening authority stated in a letter: "The request for discharge in lieu of court-martial submitted by SGT Devin S. Brinston is denied. Court-Martial will proceed as scheduled."

The order of the convening authority that underlies this appeal was promulgated on April 20, 1989—one day before the convening authority denied the accused's request for discharge in lieu of court-martial. General Court-Martial Order No. 3, with the staff judge advocate signing "FOR THE COMMANDER," stated:

> In the general court-martial case of SERGEANT DEVIN S. BRINSTON, . . . the findings of guilty and the sentence as promulgated by General Court-Martial Order No. 1, this headquarters, dated 9 November 1988, were set aside on 23 March 1989. *The charges are dismissed. All rights, privileges, and property of which*

the accused has been deprived by virtue of the findings of guilty and the sentence so set aside will be restored. A rehearing has been ordered before another court-martial which has been designated. The sentence was adjudged on 27 September 1988. (ACM 27269)

(Emphasis added.)

II

A

It is apparent, of course, that the emphasized language of GCMO No. 3 sends two opposing signals—that the charges are dismissed and that the charges will be tried at a rehearing that already has been ordered, by a court-martial that already has been designated.

It is also apparent how this anomaly occurred. Appendix 17, Manual, *supra,* contains several "Forms for Court-Martial Orders," one set of which is "for supplementary orders promulgating results of affirming action." *See* App. 17b. One of the forms in this set may be used when, as was the situation in the accused's first appeal, the findings and sentence have been set aside.

In such an instance, two courses typically are open to the convening authority: dismissal of the charges or having a rehearing on them. The particular form order in question provides for both alternatives, with parentheses around each to indicate that the drafter of the order *should choose one or the other.* Unfortunately, the drafter of GCMO #3 omitted to select the appropriate option and, instead, included both opposing provisions in the same order. Equally unfortunately, no one noticed this error until the Court of Military Review did so and specified the matter for briefs of the parties. Had it been noticed at some earlier point, apparently it easily could have been corrected. *See* 29 MJ at 872 n.1, citing para. 17-1e, AFR 111-1.

B

As already indicated, the majority of the Court of Military Review concluded that saying "[t]he charges are dismissed" means exactly what that plain language says, "[w]hether or not intended," and that this sentence divested the court-martial of jurisdiction over the dismissed charges. *Id.* at 872. The Government in this Court counters that, while that sentence may be clear, the order as a whole is ambiguously inconsistent internally. Accordingly, the Government reasons, it is appropriate to look outside of that order, at all the surrounding circumstances, to determine which of the two alternatives the convening authority actually intended. On the other hand, the accused strenuously resists this invitation to ignore the clear language of the sentence dismissing the charges. In support of the majority opinion below, the accused contended in oral argument in this Court, "No amount of intent of the parties can create jurisdiction where none exists."

The majority of the Court of Military Review and the Government in this Court rely heavily on *United States v. Motes,* 40 CMR 876 (ACMR 1969). In that case, the staff judge advocate in his pretrial advice had recommended that several specifications be dismissed prior to referring the remainder of them to trial; the convening authority had agreed. Thereafter, though, the accused had submitted a pretrial agreement in which he had offered "to plead guilty to *all* . . . specifications" except one, in return for a specific limitation on the approved sentence. The convening authority had agreed to this, as well.

At trial, the accused had entered pleas consistent with his pretrial agreement. The charge sheet, however, had reflected that all of the specifications that the staff judge advocate had recommended be dismissed had been lined through. In explanation, the second page of the charge

sheet had contained a notation signed by trial counsel that all specifications, except the one to which the accused had not agreed to plead guilty, had been "inadvertently lined through" and that "the accused will be tried on all specifications and charges except the" one to which he had not agreed to enter a guilty plea. *Id.* at 878.

The Court of Military Review concluded that, after he had agreed with the staff judge advocate's advice to dismiss several of the specifications before referring the rest to trial—and, indeed, after he had done exactly that in his referral of the charges—the convening authority had nowhere properly countered that order, notwithstanding the subsequent pretrial agreement to the contrary. Inasmuch as the lined-through specifications had never been "properly referred to trial," the court dismissed them. *Id.* at 879.

On these facts, though, *Motes* is inapposite. The challenged specifications in that case never had been properly referred to trial; here, of course, that is not the case—quite clearly, the convening authority, prior to promulgating GCMO #3 had rereferred the original charges to "an 'other' trial."

This is also not a case in which, subsequent to the rereferral, the convening authority single-mindedly ordered some other action. Indeed, as government counsel acknowledged in oral argument before us, if GCMO #3 had stopped after the sentence purporting to dismiss the charges, "We would not be standing here today." In such a case, the order plainly would speak for itself, and we would not search outside of that order for some conjectured "intent" to the contrary. *See United States v. Ware,* 5 MJ 24 (CMA 1978).

Instead, this is a case where all prerequisites to court-martial jurisdiction have been met, including rereferral of the charges by a proper convening authority to a properly convened court-martial, and where the convening

authority subsequently promulgates an order which is internally ambiguous regarding his intent.

In this respect, this case is conceptually similar to that before the Court in *United States v. McDaniel,* 7 USCMA 56, 21 CMR 182 (1956). There, the accused had received a sentence from a special court-martial that had included a bad-conduct discharge, as well as confinement, forfeitures, and reduction in grade. In his action on the findings and sentence, the convening authority had not explicitly approved the discharge but, instead, had approved "only so much of the sentence as provides for" the remaining elements of the sentence.

Later in the same order, however, the convening authority had stated that "execution of that portion . . . [of the sentence] adjudging bad conduct discharge is suspended. . . ." Of course, the discharge could not have been "suspended" unless, first, it had been approved. Consistent with this implicit approval of the discharge, the convening authority then had concluded his order by forwarding the case "for action under Article 65(b), UCMJ." *Id.* at 57, 21 CMR at 183. Article 65(b), 10 U.S.C. § 865(b), as in effect at that time, required a special court-martial convening authority to forward any record of trial that contained an approved "bad-conduct discharge, whether or not suspended, . . . to the" general court-martial convening authority for review.

Thus, in the same order, the convening authority had signaled, first, an intent not to approve the punitive discharge and, then, an intent to approve it but to suspend its execution.

The Court first noted, "We are not dealing here with two instruments that are separate in time, circumstance, and content. There is only one instrument." Then, the opinion set out the legal principles that would govern its approach:

> This Court has frequently pointed out that a writing should be construed to give meaning and effect to all its provisions. *United States v. Gray*, 6 USCMA 615, 620, 20 CMR 331; *United States v. Padilla*, 1 USCMA 603, 5 CMR 31; *United States v. Lucas*, 1 USCMA 19, 22, 1 CMR 19. When alternative constructions are possible "the more reasonable should be chosen." *United States v. Padilla, supra*, 607.

Chief Judge Quinn concluded: "Applying these . . . principles . . . it incontrovertibly appears that the convening authority's action implied approval of the discharge . . . ." *Id.* at 59, 21 CMR at 185.

Our approach in *McDaniel* to discern the convening authority's true intent from an order that was internally ambiguous due to inconsistency between its parts follows generally accepted rules of construction. *See generally* 2A *Sutherland Stat. Const.* §§ 46.05 (4th ed.1984 rev.) (legislative intent in enacting a statute should be gleaned from the statute as a whole rather than from any of its parts) and 47.02(4) ("the entire act must be read together because no part of the act is superior to any other part" (footnote omitted)); K. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed," 3A Sutherland, *supra* at 207 ("Statutes in pari materia must be construed together." (Footnote omitted.))

The accused has cited *United States v. Bass*, 404 U.S. 336, 347-48, 92 S.Ct. 515., 522-23, 30 L.Ed.2d 488 (1971), in urging us to follow, instead, the "rule of lenity"—that is, broadly stated, where a writing lends itself equally to two different readings, the choice should be that reading which is least harsh to the accused. We conclude, though, that the policies underlying that principle, which the Court discussed there, do not apply in this context.

C

While, as we discussed earlier, the two parts of GCMO #3 seem to be diametrically inconsistent, there is one wrinkle inside the four corners of that order which suggests the more reasonable construction of what the convening authority intended.

The form order in Appendix 17b of the Manual, from which GCMO #3 was patterned, provides alternatively: "(The charges are dismissed . . . .)(A rehearing is *ordered* before another court-martial *to be designated.*)" (Emphasis added.) By comparison, GCMO #3 stated: "The charges are dismissed . . . . A rehearing *has been ordered* before another court-martial *which has been designated.*" By modifying the language as emphasized above, the convening authority affirmatively indicated his awareness of his earlier rereferral of the original charges to a general court-martial that he had already convened. We are satisfied that, in this way, the convening authority implied his intent that "an 'other' trial" be held on the original charges, rather than an intent that those charges be dismissed.

Concededly, if all the surrounding circumstances and events that occurred once these charges were returned to the convening authority convincingly indicated to the contrary, our confidence in this construction of GCMO #3 might be shaken. On the contrary, though, every single event that transpired from the moment the charges were returned up through and after the other trial all shout for this construction of that order. For example, it seems highly unlikely that the convening authority would have acted on Brinston's request for a discharge in lieu of court-martial if he had intended on the preceding day to dismiss the charges. *Cf. United States v. Wilkins*, 29 MJ 421, 424 (CMA 1990) (convening authority's entering into a pretrial

agreement providing for guilty pleas to offenses that had not formally been referred to a court-martial "was the functional equivalent of an order by the convening authority that the charges be referred to the court-martial for trial").

III

Accordingly, the first certified question is answered in the affirmative; as a result, we need not answer the second, so we decline to do so.

The decision of the United States Air Force Court of Military Review setting aside the findings and sentence is reversed. The record of trial is returned to the Judge Advocate General of the Air Force for submission to that court for further review.

Judges COX and SULLIVAN concur.

APPENDIX C

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 27269 (f rev)

UNITED STATES

v.

SERGEANT DEVIN S. BRINSTON, FR 339-62-2269,
U.S. AIR FORCE

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21 December 1990

Sentence adjudged 26 April 1989 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Mildred L. Raichle (sitting alone).

Approved sentence: Bad conduct discharge, confinement for six (6) months and one (1) day, forfeiture of four hundred fifty dollars ($450.00) pay per month for sixteen (16) months and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Captain Ronald A. Gregory. Appellate Counsel for the United States: Colonel Robert E. Giovagnoni and Major Paul H. Blackwell, Jr.

Before

LEONARD, RIVES and MCLAUTHLIN
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

PER CURIAM:

This case has been remanded to us for further review. *United States v. Brinston,* 31 M.J. 222 (C.M.A. 1990). When the case was originally before us, we set aside the findings and sentence because a supplementary court-martial order dismissed appellant's charges before his court-martial convened. *United States v. Brinston,* 29 M.J. 871 (A.F.C.M.R. 1989). Our senior court reversed our decision, finding the dismissal language in the court-martial order to be an administrative error that did not deprive appellant's court-martial of jurisdiction. 31 M.J. at 227.

No further briefs of counsel have been submitted for our further review consideration. Upon reconsideration of the original briefs of counsel, the entire record of trial, and the decision of the United States Court of Military Appeals; we conclude that appellant's findings and sentence are correct in law and fact and the approved sentence is appropriate. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

[SEAL]

OFFICIAL

/s/ Pamela D. Stevenson

PAMELA D. STEVENSON
Captain, USAF
Chief Commissioner

APPENDIX D

U.S. COURT OF MILITARY APPEALS
USCMA Dkt. No. 64123/AF
CMR Dkt. No. 27269

UNITED STATES, APPELLEE,

v.

DEVIN S. BRINSTON, (339-62-2269), , APPELLANT

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review on further review, we are satisfied that the action taken by that court following our earlier decision in this case (31 MJ 222 (1990)) was correct as a matter of law. Accordingly, it is by the Court, this *12th* day of *June*, 1991

ORDERED:

That said petition is granted; and

That the decision of the United States Air Force Court of Military Review on further review is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (GREGORY)
Appellate Government Counsel

APPENDIX 17

FORMS FOR COURT-MARTIAL ORDERS

★a. *Forms for initial promulgating orders*

[Note. The following is a form applicable in promulgating the results of trial and the action of the convening authority in all general and special court-martial cases. Omit the marginal side notes in drafting orders. *See* R.C.M. 1114(c).]

Heading

(General (Special)
Court-Martial Order No. _____

(Headquarters) (USS)
_____ 19 ____

(1e)

[Note. The date must be the same as the date of the convening authority's action, if any.]

(Grade) (Name) (Service No.) (Armed Force)

(Unit)

Arraignment

was arraigned (at/on board _____) on the following offenses at a court-martial convened by (this command) (Commander, _____).

Offenses

CHARGE I. ARTICLE 86. Plea: G. Finding: G.

Specification 1: Unauthorized absence from unit from 1 April 1984 to 31 May 1984. Plea: G. Finding: G.

[Note. Specifications may be reproduced verbatim or may be summarized. Specific factors, such as value, amount, and other circumstances which affect the maximum punishment should be indicated in a summarized specification. Other significant matters contained in the specification may be included. If the specification is copied verbatim, include any amendment made during trial. Similarly, information included in a summarized specification should reflect any amendment to that information made during the trial.]

Specification 2: Failure to repair on 18 March 1984. Plea: None entered. Finding: Dismissed on motion of defense for failure to state an offense.

[Note. If a finding is not entered to a specification because, for example, a motion to dismiss was granted, this should be noted where the finding would otherwise appear.]

CHARGE II. ARTICLE 91. Plea: NG. Finding: NG, but G of a violation of ARTICLE 92.

Specification: Disobedience of superior noncommissioned officer on 30 March 1984 by refusing to inspect sentinels on perimeter of bivouac site. Plea: NG. Finding: G, except for disobedience of superior noncommissioned officer, substituting failure to obey a lawful order to inspect sentinels on perimeter of bivouac site.

CHARGE III. ARTICLE 112a. Plea: G Finding: G.

Specification 1: Wrongful possession of 150 grams of marijuana on 24 March 1984. Plea: G. Finding: G.

Specification 2: Wrongful use of marijuana while on duty as a sentinel on 24 March 1984. Plea: G. Finding G.

Specification 3: Wrongful possession of heroin with intent to distribute on 24 March 1984. Plea: NG. Finding: G.

CHARGE IV. ARTICLE 121. Plea: NG. Finding: G.

Specification: Larceny of property of a value of $150.00 on 27 March 1984. Plea: NG. Finding: G, except the word "steal," substituting "wrongfully appropriate."

Acquittal

If the accused was acquitted of all charges and specifications, the date of the acquittal should be shown: "The findings were announced on 19 ."

SENTENCE

Sentence adjudged on _____ 19 ____ : Dishonorable discharge, forfeiture of all pay and allowances, confinement for 2 years, and reduction to the lowest enlisted grade.

Action of convening authority

ACTION

[Note. Summarize or enter verbatim the action of the convening authority. Whether or not the action is recited verbatim, the heading, date, and signature block of the convening authority need not be copied from the action if the same heading and date appear at the top of this order and if the name and rank of the convening authority are shown in the authentication.]

Authentication

[Note. *See* R.C.M. 1114(e) concerning authentication of the order.]

Joint or common trial

[Note. In case of a joint or common trial, separate orders should be issued for each accused. The description of the offenses on which each accused was arraigned may, but need not, indicate that there was a coaccused.]

b. Forms for supplementary orders promulgating results of affirming action

[Note. Court-martial orders publishing the final results of cases in which the President or the Secretary concerned has taken final action are promulgated by departmental orders. In other cases the final action may be promulgated by an appropriate convening authority, or by an officer exercising general court-martial jurisdiction over the accused at the time of final action, or by the Secretary concerned. The following sample forms may be used where such a promulgating order is published in the field. These forms are guides. Extreme care should be exercised in using them. If a sentence as ordered into execution or suspended by the convening authority is affirmed without modifications and there has been no modification of the findings, no supplementary promulgating order is required.]

Heading
*See above.

Sentence
-Affirmed

In the (general) (special) court-martial case of (*name, grade or rank, branch of service, and service number of accused,*) the sentence to bad-conduct discharge, forfeiture of _____ _____ , and confinement for _____ , as promulgated in (General) (Special) Court-Martial Order No. _____ , (Headquarters) (Commandant, _____ Naval District) _____ , dated _____ 19 ____ , has been finally affirmed. Article 71(c) having been complied with, the bad-conduct discharge will be executed.

or

-Affirmed in part

In the (general) (special) court-martial case of (*name, grade or rank, branch of service, and service number of accused,*) only so much of the sentence promulgated in (General) (Special) Court-Martial Order No. _____ , (Headquarters) (Commandant, _____ Naval District) _____ , dated _____ 19 ____ , as provides for _____ , has been finally affirmed. Article 71(c) having been complied with, the bad-conduct discharge will be executed.

or

In the (general) (special) court-martial case of (*name, grade or rank, branch of service, and service number of accused,*) the findings of guilty of Charge II and its

specification have been set aside and only so much of the sentence promulgated in (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____ Naval District) _____, dated _____ 19_____, as provides for _____, has been finally affirmed. Aritcle 71(c) having been complied with, the bad-conduct discharge will be executed.

or

-Affirmed in part; prior order of execution set aside in part

In the (general) (special) court-martial case of (*name, grade or rank, branch of service, and service number of accused,*) the proceedings of which are promulgated in (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____ Naval District) _____, dated _____ 19_____, the findings of guilty of Charge I and its specification, and so much of the sentence as in excess of _____ have been set aside and the sentence, as thus modified, has been finally affirmed. Article 71(c) having been complied with, all rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and that portion of the sentence so set aside will be restored.

or

Findings and sentence set aside

In the (general) (special) court-martial case of (*name, grade or rank, branch of service, and service number of accused,*) the findings of guilty and the sentence as promulgated by (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____ Naval District) _____, dated _____ 19_____, were set aside on _____ 19_____. (The charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and the sentence so set aside will be restored.) (A rehearing is ordered before another court-martial to be designated.)

Authentication

See R.C.M. 1114(e).

c. Forms for orders remitting or suspending unexecuted portions of sentence

Heading

See a above.

Remissions; suspension
See R.C.M. 1108

The unexecuted portion of the sentence to _____, in the case of (*Name, grade or rank, branch of service and service number of accused,*) promulgated in (General) (Special) Court-Martial Order No. ___, (this headquarters) (this ship) (Headquarters _____) (USS _____), _____ 19_____, is (remitted) (suspended for _____months, at which time, unless the suspension is sooner vacated, the unexecuted portion of the sentence will be remitted without further action).

Authentication

See R.C.M. 1114(e).

d. Forms for orders vacating suspension

[Note. Orders promulgating the vacation of the suspension of a dismissal will be published by departmental orders of the Secretary concerned. Vacations of any other suspension of a general court-martial sentence, or of a special court-martial sentence which as approved and affirmed includes a bad-conduct discharge, will be promulgated by the officer exercising general court-martial jurisdiction over the probationer (Article 72(b)). The vacation of suspension of any other sentence may be promulgated by an appropriate convening authority under Article 72(c). *See* R.C.M. 1109.]

Heading

See a above.

Vacation of suspension

So much of the order published in (General) (Special) (Summary) (Court-Martial Order No. _____) (the record of summary court-martial), (this headquarters) (this ship) Headquarters _____) (USS _____), _____ 19_____, in the case of (*name, grade or rank, branch of service, and service number of accused*), as suspends, effective _____ 19_____, execution of

the approved sentence to (a bad-conduct discharge) (confinement for _____ (months) (years)) (forfeiture of _____), (and subsequently modified by (General) (Special) Court-Martial Order No. _____, (this headquarters) (this ship) (Headquarters _____) (USS _____), _____ 19_____, is vacated. (The unexecuted portion of the sentence to _____ will be executed.) (_____ is designated as the place of confinement.)

[Note. *See* R.C.M. 1113 concerning execution of the sentence.]

Authentication

See R.C.M. 1114(e)*See* R.C.M. 1114(e).

4e

e. Forms for orders terminating deferment

[Note. When any deferment previously granted is rescinded after the convening authority has taken action in the case, such rescission will be promulgated in a supplementary order. *See* R.C.M. 1101(c) (7) (C).]

Heading

See a above.

Rescission of deferment

The deferment of that portion of the sentence that provides for confinement for _____ (months) (years) published in (General) (Special) Court-Martial Order _____, (this headquarters) (this ship) (Headquarters _____) (USS _____), _____ 19_____, in the case of (*name, grade or rank, branch of service, and service number of accused*) (is rescinded.) (was rescinded on _____ 19_____.) The portion of the sentence to confinement will be executed. (_____ is designated as the place of confinement.)

Authentication

See R.C.M. 1114(e).

[Note. Deferment may be terminated by an appropriate authority once the conviction is final under Article 71(c) and R.C.M. 1208(a). *See* R.C.M. 1101(c) (7).]

Heading

See a above.

In the (general) (special) court-martial case of (*name, grade or rank, branch of service, and service number of accused,*) the sentence to confinement (and _____), as promulgated in (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____ Naval District) _____, dated _____ 19_____, has been finally affirmed. Service of confinement was deferred on _____ 19_____. Article 71(c) having been complied with, the (bad-conduct discharge and the) sentence to confinement will be executed. (_____ is designated as the place of confinement.)

Authentication

See R.C.M. 1114(e).